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MOHD RIDZWAN ABDUL RAZAK

v.

ASMAH HJ MOHD NOR

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HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CIVIL SUIT NO: 23NCVC-102-12/2011]
24 SEPTEMBER 2012

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TORT: *Defamation - Libel - Defendant's false accusation against plaintiff - Sexual harassment at workplace - Letter of complaint sent to superior - Whether complaints untrue - Whether complaints affected plaintiff's employment prospects - Whether defendant had defamed plaintiff - Whether defendant's allegations proven - Corroboration of defendant's*

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evidence - Whether admissible - Defendant's counterclaim - Whether defendant suffered from mental pain and suffering - Whether defendant awarded with general damages

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The plaintiff was employed as the head of department of the risk management division in Lembaga Tabung Haji ('Tabung Haji'), while the defendant, a senior manager in the same division, was working under the direct supervision of the plaintiff. The defendant lodged a formal complaint about the plaintiff's sexual harassment of her, where he was found uttering vulgar words to her and

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making sex oriented jokes in her presence. The letter of complaint was addressed to the CEO of Tabung Haji, the plaintiff's superior, and various instances of the plaintiff's misconduct were stated therein. In her letter of complaint, the defendant alleged that the plaintiff's immoral behaviour had affected her psychologically, increased her mental stress and affected her motivation as well as

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her job satisfaction. An inquiry was then carried out. In attempting to gauge the truth of these complaints and seeking a way to resolve an embarrassing situation, Tabung Haji had issued the plaintiff with a serious administrative warning not to repeat such

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misconduct and transferred him to another department on a temporary basis. The plaintiff filed the present claim in defamation against the defendant. The plaintiff submitted that the defendant's remarks in her letter of complaint were defamatory of the plaintiff in their plain and ordinary meaning and were calculated to injure

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his good reputation. It was the plaintiff's case that (i) the defamatory remarks, which were untrue, had affected his employment prospects; and (ii) he faced difficulties in finding a new job for some six months. He thus sought, *inter alia*, a public

apology from the defendant and general and aggravated damages. In her defence, the defendant maintained that the allegations of sexual harassment in her complaint were all true and she had not defamed the plaintiff. Further, the defendant counterclaimed for general, aggravated and exemplary damages for the mental and emotional pain and suffering she had suffered due to the plaintiff's acts of sexual harassment. It was the defendant's evidence that in addition to the plaintiff's obscene jokes, comments and e-mails, he had also suggested or invited the defendant to be his second wife on three occasions. The defendant also claimed that her temporary transfer to another department, which had lasted for 15 months also led to her further humiliation and her decision to leave her present employment. In support, the defendant relied on the evidence of a psychiatrist, who was treating her.

Held (dismissing the plaintiff's claim and allowing the defendant's counterclaim):

(1) The complaint against the plaintiff for making sex oriented jokes in front of his subordinates was considered by looking at three separate incidents, *ie*, (i) the plaintiff's alleged use of the words 'walk the cock' in the presence of the defendant and three others; (ii) the plaintiff's alleged use of the words 'mimpi berjimak' in the presence of the defendant and his secretary; and (iii) the 'coconut terangkat' incident when the plaintiff narrated yet another sexual joke in the presence of the defendant. The plaintiff had not made any reference to the 'walk the cock' incident in his evidence. Neither were the plaintiff's witnesses specifically asked about this incident except to admit that it was normal for the plaintiff to make sex oriented comments. It was clear that the 'mimpi berjimak' incident had in fact taken place on a balance of probabilities. Further, the 'coconut terangkat' incident had also taken place. In the circumstances, the defendant had proven the truth of her complaint against the plaintiff for making sex oriented dirty jokes in front of his subordinates. (paras 83-88)

(2) The incident where the plaintiff was alleged to have uttered a vulgar remark, 'Fuck Off' to the defendant was found to have been more than proved. The plaintiff's attempt to explain that he had said 'Get Off' instead of the vulgar remark was totally unconvincing. The plaintiff had no business uttering such words to the defendant, which could be viewed as harassment. (paras 78-82)

(3) The plaintiff's witnesses had corroborated the defendant's version of events that the plaintiff had invited the defendant to be his second wife. Corroboration of the defendant's evidence of sexual harassment could come from witnesses for the plaintiff or the plaintiff himself. These words or utterances, whether intended to be actual proposals or not, amounted to instances of sexual harassment in the work place, which should never have happened in an institution such as Tabung Haji. (paras 78, 91 & 92)

(4) The defendant's complaint to the CEO of Tabung Haji had complied with the proper procedure for making complaints. As such, no malice could be inferred from her actions. Further, the various complaints as set out in the defendant's letter of complaint were true. As such, the plaintiff had failed to prove that the defendant had defamed him through the contents of the letter of complaint. On the other hand, the defendant had succeeded in making out her counterclaim of sexual harassment against the plaintiff. (paras 93-96, 102 & 105)

(5) The sexual harassment committed by the plaintiff had the effect of changing the defendant into a person who was depressed, subdued and always sad. The defendant's medical condition found confirmation in the evidence of the psychiatrist who saw and treated her. The psychiatrist's clinical findings as to the defendant's emotional and mental pain and suffering had not been seriously challenged. The nature and length of the harassment and the fact that the defendant was the plaintiff's immediate subordinate and therefore in a weaker and more inferior position, were factors that ought to be taken into consideration when determining the quantum of general damages. The defendant was awarded a sum of RM100,000 as general damages and a sum of RM20,000 as aggravated and exemplary damages with interest and costs. (paras 103, 104, 106 & 107)

Case(s) referred to:

Abdul Aziz Jelani & Anor v. Peter Chua Swee Lai [2000] 2 CLJ 402 HC ***(refd)***

Bre Sdn Bhd & Ors v. Tun Datuk Patinggi Hj Abdul Rahman Ya'kub [2005] 2 CLJ 645 CA ***(refd)***

Ernest Cheong Yong Yin v. Low Kim Yap & Ors [2006] 6 CLJ 608 HC ***(foll)***

Voon Lee Shan v. Sarawak Press Sdn Bhd & Anor [2004] 5 CLJ 430 HC ***(refd)***

For the plaintiff - Aisya Abdul Rahman; M/s Azzat & Izzat
For the defendant - Hazwan Mohd Nor; M/s Hazizah & Co

Reported by Vani Krishnan

JUDGMENT

Amelia Tee Abdullah J:

[1] The plaintiff, Mohd Ridzwan bin Abdul Razak, has filed a claim against the defendant, Asmah binti Hj Mohd Nor, for declaratory relief to the effect that he was not guilty of committing sexual harassment against the defendant as alleged in her complaint. In addition to a public apology, the plaintiff also seeks general and aggravated damages against the defendant, interest, and costs. As such, the crux of the plaintiff's claim is that the defendant's complaint to the Chief Executive Officer of Lembaga Tabung Haji ("Tabung Haji") were defamatory of the plaintiff, calculated to injure his good reputation, and tantamount to defamation in law. In para. 16(e) of his statement of claim, the plaintiff surprisingly seeks from Tabung Haji, which is NOT a party to this suit, a withdrawal of the serious administrative warning ("amaran keras secara pentadbiran") from the plaintiff's service or employment record.

[2] The plaintiff's claims are disputed by the defendant, Asmah binti Hj Mohd Nor, who contends that the allegations in her complaint were all true. In any event, the defendant denies that the plaintiff is entitled to any damages since the non-renewal of his contract did not arise from her complaint. The defendant has also counter-claimed for general, aggravated, and exemplary damages for mental and emotional pain and suffering arising out of the plaintiff's acts of sexual harassment against her.

The Plaintiff's Case

[3] The plaintiff, Mohd Ridzwan bin Abdul Razak, was at the material time of the various incidents the Pengurus Besar (Pengurusan Risiko) (Kontrak). His letter of offer (pp. 3-7 of CB) would show that he was appointed with effect from 1 March 2008 for a period of two years, which term could be renewed with the consent or agreement of Tabung Haji. In such position, he claims that he was a member of the senior management of Tabung Haji.

[4] The defendant is a senior manager in the Risk Management Division (Bahagian Pengurusan Risiko) of Tabung Haji since 23 July 2009 and as such would be an officer working under the direct supervision of the plaintiff.

[5] *Vide* a letter dated 29 July 2009 (pp. 1-2 of CB) addressed to the Chief Executive Officer of Tabung Haji, the defendant lodged a formal complaint against the plaintiff. The plaintiff claimed that he only knew about the complaint on 23 July 2009 and only saw the letter of complaint after his employment with Tabung Haji was terminated. In summary, the defendant's many and varied complaints against the plaintiff can be summarised as follows:

(i) On 19 July 2009 at 8.15am, the plaintiff uttered a vulgar remark towards her in his office. The incident was witnessed by Puan Noraliah Sarin;

(ii) The plaintiff was fond of making sex oriented and dirty jokes in front of his subordinates;

(iii) The plaintiff had been using dirty words in e-mails which the defendant found to be very disturbing, unethical, and intolerable, especially in an Islamic institution. A print out of the e-mails was attached as evidence;

(iv) The plaintiff had repeatedly offered to the defendant to be his second wife. The defendant did not find these offers to be funny but disgusting. She claimed that she felt belittled, insulted and humiliated; and

(v) The plaintiff had taken advantage of his position as a boss to say anything he liked without regard to the feelings and perception of others.

[6] In her letter of complaint, the defendant states that the plaintiff's immoral behaviour had affected her psychologically where she is now suffering from "depression due to anger, humiliation, frustration, and disgust towards him". Her health had also been affected where she suffers from frequent migraines due to increased mental and emotional stress. Her motivation and job satisfaction had deteriorated due to the disturbances that she had to endure over the previous five months. The defendant claimed that she was bringing up the matter as she was not the only victim but that the other ladies were too afraid to speak out.

[7] Following this complaint, Tabung Haji carried out an investigation into the defendant's complaint from 1 September 2009 to 16 September 2009. The members of the Jawatankuasa Siasatan were:

(i) The Pengurus Besar Bahagian Bimbingan Haji, Tengku Aziz bin Raja Abdullah;

(ii) The Pengurus Besar Bahagian Pentadbiran, Puan Norul Huda bte Mohd Sidek; and

(iii) The Pengurus Kanan Bahagian Perundangan, Puan Azrin Syahnidar bte Mohd Ariffin.

[8] The Jawatankuasa Siasatan had called four witnesses, namely:

(i) Puan Noor Safinee Sahat, the plaintiff's then secretary;

(ii) Puan Noraliah Sarin, a manager in Risk Management Division;

(iii) Encik Mohamad Azman bin Alias, a unit head in Risk Management Division; and

(iv) Encik Azmi Mohammad Nor, a senior manager in Risk Management Division.

[9] According to the plaintiff, apart from the afore-stated witnesses, other individuals who would have read or known about the defendant's letter of complaint are Datuk Ismee Ismail, Dato' Kamaruddin Ali, the Chief Operations Officer, Puan Hazlina binti Khalid, the Head of Bahagian Perundangan and Encik Zubir bin Ahmad, the Senior General Manager of the Bahagian Sumber Manusia. Encik Zubir was together with Dato' Kamaruddin in a discussion on 19 August 2009 where Dato' Kamaruddin had informed the plaintiff about the decision not to suspend him while investigations were on-going. Puan Hazlina was present when Puan Azrin Syahnidar interviewed the plaintiff's secretary, Puan Nor Safinee. And thereafter, the defendant was transferred to a department under the supervision of Puan Hazlina with effect from 24 July 2009.

[10] In his witness statement, the plaintiff had responded to certain specific allegations of sexual harassment. In relation to the allegation that he had, on 19 July 2009 at about 8.15am, uttered

A the words "fuck off" to her when she had gone to see him over some work, the plaintiff denied that he had used the said words. He claimed that the words which he had used were "get-off" which meant to "go away". He further offered the explanation that on that day in question he was in a bad mood because:

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(i) He suddenly experienced a "masalah penglihatan" in his right eye which caused him not to be able to focus properly;

(ii) His printer was having problems and not functioning properly just when he needed to print something quickly for use at a C meeting at Tabung Haji's office at Bandar Enstek, Sepang; and

(iii) This mechanical problem had disturbed his concentration which had caused him to be angry and resentful ("marah dan geram"). And when the defendant entered his room, he had D scolded her. He told the court that he regretted scolding the defendant because she had done nothing wrong. After the meeting that day, he had met with her and apologised to her twice.

E **[11]** In relation to the defendant's allegations that he had liked to make sex oriented dirty jokes in the office, the plaintiff referred to the first incident where he had allegedly said: "Kalau nak cari husband, cari yang beragama, bertanggungjawab, macam I ... you kena buat sembahyang istikharah dan kalau you mimpi, you akan F mimpi berjimak dengan orang tu ...". Whilst the plaintiff admitted that the incident did take place, however he denied the use of the alleged words. He denied using the words "you cari beragama dan bertanggungjawab macam I" and "you akan mimpi berjimak dengan orang tu". He claimed that he had used words such as "mimpi G bersanding dengan merujuk kepada selepas sembahyang istikarah".

[12] In relation to the defendant's complaint that he had used his hand to signal the word "ball" when uttering the words "Ingat tak seorang cina masa di bank dulu? Kalau you pergi meeting, you kena tebalkan muka, you kena ada strong ball", the plaintiff denied H that he had made the alleged hand signal or even uttered the alleged words to the defendant. According to him, during the meeting he was talking to Encik Azmi bin Mohammad Nor, a risk manager, that they would need to be strong livered and thick skinned ("mempunyai sifat kekentalan hati kuat dan tebal muka") I in light of the many challenges faced by Tabung Haji. He claimed that he was using an example of a senior general manager at

Alliance Bank who had remained resilient and persevering despite being attacked by the CEO and the Board of Directors. He claimed that he had drawn an analogy between the skin of that person and that of the skin of an elephant added to a rhinoceros. He claimed that although at that point in time he had made a fist ("menggenggam tangan saya"), he had done so to signify the resilience of the said senior general manager of Alliance Bank. He demonstrated to the court his action by making a fist at his chest level. The court seriously queries what the action of a clenching of the fist at chest level would have to do with having a thick skin.

[13] With reference to yet another allegation of improper language, this time said to the defendant in the presence of Noraliah Sarin to the effect that: "Kalau you nak tahu 'benda' lelaki itu berfungsi ke tak ikut orang-orang tua, ikat 'benda' tu dekat tali. Tali itu disambungkan dengan buah kelapa. Kalau buah kelapa itu terangkat, maksudnya 'benda' itu good ... Sexual graph of a person - men after 50 is no use. Kalau 20 it shoots up. 30 graf turun. When 40, it shoots up again" together with hand signals of going up and down, the plaintiff only denied that the incident occurred.

[14] The plaintiff also denied the defendant's complaint that he had spelled out that the password to his lap top computer is "F-U-C-K". Instead, he claimed that his password is actually "R-I-S-K" where in Tabung Haji, he was known as Dr Risk.

[15] Reference was also made to various e-mails of the plaintiff. At pp. 8-9 of CB, there were messages from the plaintiff such as:

(i) "ANOTHER SOB, TYPICAL HOMEBREED" (10 April 2009); and

(ii) "I AM BEGINNING TO HATE VERY MUCH THESE HOMEBREED, WORST THAN KINZIR" (30 April 2009).

The plaintiff did not deny that he was the maker of these e-mails but denied that the comments referred to the defendant. He explained that the word "HOMEBREED" referred to staff who had worked for a long time with Tabung Haji. According to him, he was referring the head of Tabung Haji's internal audit, Encik Azhar Nayan. His explanation for the e-mails was that he was angry with internal audit because despite having explained to Encik Azhar in early February 2009 that Bank Negara's Guidelines on AMLA had required that an internal audit report to be sent to

Bank Negara, Encik Azhar had refused to do so claiming that Risk Management should prepare and send the report. The plaintiff was angry with Encik Azhar but had expressed these comments in e-mails to the defendant because he claimed that the defendant "memahami keadaan itu".

[16] And lastly, in response to the defendant's allegation that the plaintiff liked to propose or suggest that she become his second wife with comments such as:

(i) "you nak kahwin dengan I tak, I banyak duit tau";

(ii) "you kena kahwin tau ... You ni asyik sakit kepala saja .. you nak laki orang tak?"; dan

(iii) "would you prefer a married man?",

the plaintiff denied all the allegations. He told the court that he is a married man with a son and three daughters and had been married to Puan Nor Azmah for 23 years. He claimed to be happy in his marriage and had no intention to take a second wife as that would hurt his wife and children.

[17] According to the plaintiff, *vide* a letter dated 12 October 2009, Tabung Haji had informed him that there was insufficient evidence to warrant disciplinary proceedings against him. However, he was issued with a serious administrative warning. The plaintiff took issue with this decision of Tabung Haji on the following grounds:

(i) That the defendant's complaint was not read to him in detail ("secara terperinci"); and

(ii) If there was insufficient evidence to find him guilty and to be imposed with an appropriate punishment, the issuance of the serious administrative warning should not have been imposed.

[18] The plaintiff advanced the following complaints:

(i) that he felt humiliated because in the eyes of the employees in his department, he is seen as a dirty-minded person with low morals. Furthermore, when the investigations were on-going, four of his staff had been called to testify. The plaintiff felt that his credibility as a head of department was totally gone, especially since he was usually very friendly with them;

(ii) that he had lost the confidence of the Chief Executive Officer of Tabung Haji especially when the latter had "meluahkan perasaan meluatnya" to the plaintiff on first receiving the defendant's complaint. The plaintiff testified that he believed that this loss of faith in him was the reason why his contract was not renewed;

(iii) that he felt embarrassed with his colleagues especially when attending Management Committee meetings where the CEO was the chairman as a number of his colleagues knew about his case. He overheard his case being talked about at the Tabung Haji surau and had then distanced himself from the surau so as not to be further embarrassed; and

(iv) as a Muslim and father to three daughters, he felt insulted ("terhina") over the defendant's allegations.

[19] The plaintiff testified that he had filed an official complaint dated 23 October 2009 against the defendant (pp. 31-33 of CB) for making allegations of sexual harassment without adequate proof. However, in a reply dated 4 December 2009 (P3), Tabung Haji informed him that no disciplinary action would be taken against the defendant.

[20] Thereafter, the plaintiff, through his solicitors, Messrs Azzat & Izzat, wrote to the defendant *inter alia* demanding an apology and retraction of the alleged defamation, and RM500,000 as damages. According to him, the defendant has neither apologised nor paid any amount as damages.

[21] It is the plaintiff's case that as a result of the defendant's allegations, his contract which was due to expire on 28 February 2010 was not renewed without any reasons being given. Reference was made to para. 2 of Tabung Haji's letter dated 2 February 2010 (pp. 37-38) (P4) which states *inter alia* that:

> Sila ambil maklum bahawa TH tidak berhasrat untuk melanjutkan kontrak perkhidmatan tuan yang akan tamat pada 28 Februari 2010. Sehubungan dengan itu, tuan dengan ini diberi satu bulan notis Penamatan Jawatan berdasarkan klausa 3.1 Surat Tawaran tersebut di atas berkuatkuasa dari tarikh surat ini.

[22] The plaintiff claimed that if not for the defendant's allegations against him, his chance for a renewal of his contract was very bright as he was an expert in the field of risk management and had been involved in investments valued at

millions of ringgit. He had never received a poor rating from his direct superior officer during his years with Tabung Haji as evidenced by the fact that he had received bonuses for the years 2008, 2009 and 2010.

[23] The plaintiff further testified that after his contract with Tabung Haji was not renewed, he encountered difficulties in securing new employment. It was only after some six months that he secured employment as the Ketua Pegawai Risiko with Bank Simpanan Malaysia.

[24] As regards the defendant's counter-claim, the plaintiff contends that the defendant's allegations of sexual harassment were untrue and without basis. The plaintiff further contends that the allegations of sexual harassment had no effect on the defendant's position, title, rank, and salary during the entire period that she was under the plaintiff's supervision in the Risk Management Division. The plaintiff claimed that he had never discriminated against the defendant at the work place or given her an adverse assessment when she was under the plaintiff's supervision. He claimed that at all material times until the termination of his contract on 28 February 2010, he had carried out his responsibilities as the supervisor and superior officer of the defendant professionally and ethically.

[25] The plaintiff further claimed that he had a professional working relationship with the defendant where the defendant was tasked with assisting the plaintiff in formulating compliance policy at Tabung Haji. Whenever the defendant had problems, she would share her problems with certain of the staff in the department, including himself. He cited an example where the defendant had encountered problems with a hospital over the negligence of a nursing staff of the hospital. The plaintiff testified that he had advised her to obtain the services of a lawyer in order to commence legal action and had also assisted her in obtaining a capable lawyer to do so.

[26] The plaintiff further testified that before the defendant's complaint, their relationship was professional and normal. The defendant had also taken lifts from him to attend official functions outside the office without any problems, for example when he, the defendant, and Encik Fadzil attended a function at Bank Negara Malaysia. The plaintiff also pointed out that one day after he was

called by the CEO about the defendant's complaint, the defendant had taken a lift in his car together with Cik Noor Safinee and Puan Norilah to go to a restaurant at Jalan Damai for a luncheon. However, after investigations commenced, the defendant was transferred to another department and he had no further interaction with her thereafter.

[27] The plaintiff agreed that "perbuatan mengungkapkan kata-kata yang lucah" should not be spoken in any company, least of all in Tabung Haji. Whilst agreeing that Tabung Haji had the discretion whether to renew or to terminate his contract, he disagreed that the defendant's letter of complaint had nothing to do with his contract not being renewed. He admitted that he commenced his present action against the defendant because he felt dissatisfied with Tabung Haji for not renewing his contract.

[28] The plaintiff called a total of three other witnesses in support of his case. (PW2). At the material time of the incident, Noor Safinee binti Mohd Sahat was the plaintiff's secretary having started being his secretary from 3 March 2008. She admitted that she knew about the defendant's complaint as she was involved in the investigations carried out by the management of Tabung Haji. She was questioned on 20 August 2009 by Puan Azrin Syahnidar and Puan Hazlina binti Khalid. PW2 was asked whether she had heard any words or conversation from the plaintiff or from any other officer or staff in the Risk Management Division which were obscene in nature ("berunsur lucah"). She was also queried as to whether she had ever heard the plaintiff inviting the defendant to become his second wife. Although PW2 admitted that the incidents did happen, however she attempted to say that there was some misunderstanding ("timbul salah faham").

[29] PW2 corroborated the plaintiff's evidence as regards the defendant having taken a lift in the plaintiff's car together with PW2 and another officer to go to a restaurant at Jalan Damai for a lunch function. According to her, the defendant did not express any objections or display any discomfort during the journey from the office to Jalan Damai.

[30] PW2 also confirmed the occurrence of the incident at PW2's cubicle where the plaintiff had told the defendant in PW2's presence that "Kalau nak cari husband, cari yang beragama, bertanggungjawab, macam I ... you kena buat sembahyang

istikharah dan kalau you mimpi, you akan mimpi berjimak dengan orang tu ...". She admitted having heard the plaintiff say the aforementioned words but explained that the plaintiff was merely advising them (PW2 and the defendant) as they were then still single. When queried as regards the defendant's reaction on hearing those words, PW2 testified that the defendant appeared normal and not shocked.

[31] As regards the plaintiff's numerous proposals to take the defendant as his second wife, it is PW2's evidence that these comments or remarks were not really proposals but were more in the nature of a joke or a prank and directed not only at the defendant. According to PW2, the plaintiff is a family man who liked to joke about his dream of taking an artiste as his second wife.

[32] From PW2's observations, the plaintiff treated the defendant as he treated the other staff, with professionalism, consideration, and understanding. On the contrary, she described the defendant as a person who was easily stressed, unprofessional, moody, and prone to headaches as well as pains in her leg. She claimed that the defendant had told her that she had suffered from a chronic pain in her leg even before she commenced work with the Risk Management Division. PW2 testified that she felt that the defendant had personal problems although she had not confided to her the nature of her problems.

[33] PW2 claimed that she was shocked when she learnt about the defendant's complaint against the plaintiff. This was because she herself had never had any problems with the plaintiff who was outgoing, friendly and approachable with all the staff. Further prior to the complaint, the defendant had never voiced to PW2 her feelings about the plaintiff's attitude and behaviour in the office.

[34] The plaintiff subpoenaed Muhammad Rani bin Saidali (PW3), the Senior General Manager of Tabung Haji to produce the investigation report in respect of the plaintiff. The investigation report, which comprises 50 pages inclusive of three Annexures, is marked as P1.

[35] PW3's evidence in court is based on the contents of P1. As can be seen at p. 7 of P1, the members of the Investigation Committee are Tengku Aziz bin Raja Abdullah, Norul Huda bte Mohd Sidek and Azrin Syahnidar bte Mohd Ariffin. A total of four witnesses were called, namely:

(i) Noor Safinee Mohd Sahat (pp. 15-21 of P1); A

(ii) Noraliah binti Sarin (pp. 22-28);

(iii) Mohammad Azman Alias (pp. 29-34); and

(iv) Azmi Mohammad Noor (pp. 35-39). B

[36] Following the inquiry or investigation, the investigation panel made the following findings:

(i) ada aduan yang boleh diterima dan berlaku.

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(ii) ada aduan yang diadukan dan tidak ada saksi yang mengesah ada berlaku.

As such, the investigation panel was of the view that "tindakan Amaran Pentadbiran dan tidak lagi melakukan perkara tersebut pada masa akan datang patut dikenakan kepada penama". Following that, a Serious Administrative Warning ("Amaran Keras Secara Pentadbiran") (P2) dated 12 October 2009 was issued to the plaintiff. D

[37] In relation to the plaintiff's complaint against the defendant, Tabung Haji had, *vide* a letter dated 4 December 2009 (P3), informed the plaintiff that no action would be taken against her. E

[38] PW3 identified P4 as the letter from Tabung Haji informing the plaintiff that his contract, which was due to expire on 28 February 2010, would not be renewed. He was personally not aware of the performance of the plaintiff and would not know why his contract was not renewed. F

[39] During cross-examination, PW3 was asked about the procedure to be followed if a staff member wished to lodge a complaint against his immediate boss. According to PW3, the complaint should be made to Human Resource Division or to the CEO directly. He confirmed that in this case the complaint that was lodged by the defendant to the CEO was in order. The immediate boss of the plaintiff is the CEO. G H

[40] With reference to the Serious Administrative Warning Letter (P2), it is PW3's evidence that this warning letter would be issued when there are insufficient facts for the case to be brought before the Disciplinary Committee. I

[41] The plaintiff's last witness, Tuan Haji Mohammad Azman bin Alias (PW4), was with the Risk Management Division from November 2008 to November 2011. Between November 2008 and February 2011, the plaintiff was then the head of the division.

[42] PW4 admitted that he was aware of the complaint lodged by the defendant because he was a witness at the inquiry held on or about September 2009. He was recalled for further inquiry at the end of February/early March 2010.

[43] According to PW4, when he heard about the defendant's complaint, he was shocked and disbelieving ("rasa terkejut dan tidak percaya") because "perkara tersebut itu biasa sahaja" and the defendant had never shown any reaction to the words that were spoken by the plaintiff. When pressed for clarification as to what it was that constituted a "perkara biasa", whether he considered the use of vulgar words with sexual connotations a "perkara biasa", PW4 testified that it was "biasa" or normal for there to be chit-chat and discussions amongst the officers about matters relating to health, daily living or work.

[44] According to PW4, the plaintiff treated the defendant the same way that he treated other officers under him. And the defendant had never sought his (PW4's) assistance to face the alleged situation. He described the defendant's work attitude as "berasa gembira dan suka dengan tugas yang dilaksanakan di pejabat". The court notes that this description is totally at odds with the perception of PW2 that the defendant was unprofessional, moody and easily stressed out.

[45] The court notes that PW4 was evasive and not forthcoming when questions were posed to him about whether the plaintiff liked to "bercerita dan bercakap pasal perkara-perkara lucah di kalangan kakitangan". Initially, he sought refuge with comments such as "Bergantung kepada situasi pada ketika itu". However, when pressed further, he admitted that the plaintiff did so with him. The answer recorded was: "Kalau dengan saya berdua memang ada. Dengan yang lain dalam keadaan umum, kadang-kadang".

[46] PW4 admitted that he had heard the plaintiff inviting the defendant to get married. However, he claimed that the invitation was made in jest.

The Defendant's Case

[47] The defendant, Asmah binti Haji Mohd Nor, joined Tabung Haji on 7 October 2008 as a senior manager in the Risk Management Division under the plaintiff who was then heading the division. Initially everything was normal, but after about two months she began to feel uncomfortable with the behaviour and manner of the plaintiff in using language with pornographic connotations ("berkias lucah"). She found that the plaintiff was too direct in his conversation, and that the words used by him were too open and unrefined. At times, she felt that she was being too sensitive and tried to act "neutral" and "buat bodoh" as though she did not understand what was being said. However, in her heart she felt very embarrassed at hearing what the plaintiff said to others and in front of her.

[48] The defendant testified that what was most uncomfortable about the plaintiff was that his stories and words would always be linked with obscene matters, whether during meetings or when advising the officers under him. She gave the following examples of the plaintiff's obscene jokes, comments and e-mails:

(i) Before the start of a meeting, and in the presence of Azmi, Tuan Haji Azman, Mohd Fazli and Noraliah Sarin, the plaintiff advised the officers using these words: "you all buat risk management kena tahu semua operation TH ... kena lead the department, you all kena walk your talk lah ... (ketawa) ... jangan pula you all walk the cock! Walk the cock bahaya tu ... (ketawa)";

(ii) In a conversation with the defendant and Shafinee, the plaintiff on the pretext of offering advice said: "kalau nak cari jodoh cari yang beriman, solat, you kena solat istikarah ... bila you solat istikarah, you akan mimpi you berjimak dengan orang tu!";

(iii) E-mails which include the following words:

(a) "Another SOB, typical homebreed" (10 April 2009)

(b) "I am beginning to hate very much these homebreed, worse than kinzir" (30 April 2009)

(iv) When the defendant was suffering from migraine in her cubicle and massaging her head with medicated oil, the plaintiff said: "you ni asyik sakit kepala saja, you ni kena kahwin tau ... you nak laki orang tak?";

(v) In front of staff in the office, the plaintiff had told stories about "benda lelaki" and how if you want to know whether it is "kuat", you would have to tie it to a coconut. If the coconut is lifted up, then it is okay;

(vi) The plaintiff had asked her whether she preferred "suami orang";

(vii) The plaintiff had asked the defendant to be his second wife on three occasions. The first occasion was early one morning, the second occasion was in his office, and the third occasion was after they had just talked about his EPF monies and his plan for early retirement so that he could go for holidays with his wife. The plaintiff said that if he should die, his wife would become an instant millionaire. Having said that, the plaintiff then asked her: "you nak jadi wife I tak? I banyak duit tau. (ketawa)"; and

(viii) On 19 July 2009 at 8.15am when the defendant knocked on the plaintiff's door to inform him that she was setting off to Nilai for a meeting, the plaintiff uttered "fuck-off" to her. The defendant, although shocked and feeling like crying, braved herself to approach his desk to ask him in English: "Dr, did you just say fuck-off to me just now?" She asked him twice but the plaintiff just said nothing and did not even look at her. She agreed that after the meeting in Nilai, the plaintiff apologised to her twice.

[49] The defendant testified that she was unable to list out all the various instances of sex harassment by the plaintiff in her complaint letter because there were just too many of them.

[50] The defendant agreed that when the plaintiff said all the various objectionable, dirty, obscene, and lewd comments to her, she did not voice out her discomfort over such behaviour before lodging her complaint. She explained that she did not voice out her objections because she was afraid. At that time, she was only a contract staff and she was fearful of any adverse effects on her employment if she complained. She told the court that she was fearful that her contract would not be renewed.

[51] On 27 September 2010, the defendant took the decision to lodge a complaint about the plaintiff to the CEO. She wrote the official letter of complaint dated 29 July 2009 to the CEO, Datuk Ismee Ismail, because she could no longer tolerate the situation. The months of "tekanan perasaan dan kemarahan" had interfered greatly with her life. She confirmed the truth of the contents of her letter of complaint in respect of the actions of the plaintiff. However, her complaint against the plaintiff was not properly dealt with but was swept under the carpet.

[52] The defendant testified that she was called before the domestic inquiry on two occasions, on 4 September 2009 and again on or about April 2010 where she had informed the members of the inquiry about the actions of the plaintiff. She said that she waited for a long time for justice to be meted out in respect of her complaint. She enquired from the Head of Human Resources and was told that the matter was settled, that the plaintiff had been given an administrative warning, and that she need not worry.

[53] The defendant told the court that she felt very dissatisfied with the decision. She felt that her complaint had not been properly investigated, that her honour and dignity was not protected and her welfare was being disregarded by Tabung Haji as her employer. She complained about the matter to the legal advisor of Tabung Haji and as a result, a second inquiry was held to verify her complaint. However, once again, nothing happened. She felt that there was no protection for her as a victim.

[54] The defendant testified that after her complaint to the CEO, she was transferred to the Legal Department. She was unhappy over her transfer which, was supposed to be only temporary in nature, but yet lasted 15 months. She felt very disappointed and sad because although she was qualified in accounting, yet she was placed in the Legal Department carrying out administrative functions, including making reservations for airline travel and hotel rooms. She claimed that on the day that she received an e-mail asking her to order "goreng pisang" for the next meeting; she cried and felt totally humiliated. She complained that there was no initiative from the Human Resource Department to place her back at her original department.

[55] Because she felt extremely pressured and humiliated over the work that she was doing in the Legal Department, the defendant sought employment elsewhere. She received an offer from Citibank with a higher salary than what she was getting in Tabung Haji. However, because she still harboured hopes of getting justice after the second inquiry, she had forgone her opportunity to move to Citibank. However, her hopes for justice were dashed when nothing happened after the second inquiry.

[56] Throughout her witness statement, the defendant had gone on at length on her mental and emotional state throughout her ordeal. Her evidence below would clearly reflect her thoughts, feelings, state of mind at the time of the harassment:

(i) "Kalau diikut hati saya rasa nak hempap kepala dia dengan dictionary saya. Terasa juga macam dihina, mentang2 umur masuk 40 tak kahwin lagi ... dia ingat saya terdesak dan suka hati dia membuli saya seperti itu. Saya memang dah cukup jijik dan jelak dengan dirty jokes dan "remarks2" Dr Risk";

(ii) "Kalau ikutkan hati saya saya rasa nak ludah muka dia ... saya terlalu marah dan sakit hati, jijik. Hari itu saya masuk toilet dan menangis ... saya geram sangat dan patahkan pensil. Dalam otak saya, saya bayangkan pensil itu tengkuk dia yang saya patahkan";

(iii) "Dia juga pernah bertanya pada saya, samada saya prefer suami orang ... bila dia tanya macam ini, saya jadi takut ...Saya cukup takut bila nak jumpa Dr Risk, pernah saya beritahu Haji Azman untuk temankan saya bila nak jumpa Dr Risk sebab saya takut bila berdua";

(iv) the defendant's reaction after the plaintiff's invitation to become his second wife: "... terkejut, marah, sakit hati, rasa nak tumbuk muka dia masa itu. Sungguh kurang ajar dan biadap. Saya rasa macam saya diperbuat macam tak ada maruah dan boleh diperlaku sesuka hatinya ... Maruah saya macam dipijak-pijak. Kerana terlalu marah kadang kadang saya rasa macam nak menjerit dekat muka dia masa itu juga - saya nak tumbuk dia, cakar muka dia, dia biadap, kurang ajar. Walaupun dia boss, dia tidak ada hak memperlaku orang bawahan seperti itu";

(v) "saya cukup tertekan di office. Bila memandu pergi kerja pagi-pagi, saya dah risau dan stress memikirkan apa yang akan terima dari Dr Risk pada hari itu. Saya cukup rasa dihina, maruah saya cukup tercalar dengan kata-kata, soalan-soalan dan jenaka kotor Dr Risk. Pernah saya terfikir dan berharap dia sakit jantung dan mati supaya saya akan mendapat boss yang baru";

(vi) "Tekanan yang saya alami ... telah mengubah diri saya menjadi seorang yang tidak ceria, sedih di dalam hati telah terpancar di muka saya sehinggakan teguran rakan sekerja yang air muka saya kelihatan sedih dan bermasalah";

(vii) "Kerana terlalu tertekan dengan ketidakadilan yang saya alami saya sering menangis di waktu malam. Saya menangis kerana terlalu tertekan, marah, sedih, terasa tidak berdaya menegakkan maruah saya".

[57] The defendant had, on the advice of Puan Lily from Bahagian Sumber Manusia, met with Tuan Haji Hushim for counselling sessions. Although the counselling sessions helped her to an extent, however the defendant claimed that she still suffered from severe emotional and traumatic stress where she was unable to sleep and was often in tears. As a result, she then decided to seek treatment from a psychiatrist, Dr Azhar Zain. The report of Dr. Zain appears as exh. D1.

[58] The defendant now works and resides in Kota Kinabalu, Sabah where she has gone to begin a new life in a new environment. However, she claims that the emotional and mental stress and confusion ("kebingungan") which she had undergone still haunts her. Her tears still flow whenever she recalls the events of the past. The events at Tabung Haji had changed her into a person who is depressed, subdued and always sad ("murung, sugul dan sentiasa sedih di dalam hati"). Hence her counter-claim against the plaintiff for general, aggravated and exemplary damages for her pain and suffering, physically, emotionally, and mentally.

[59] In support of her case, the defendant relied on the evidence of Azhar bin Md Zain (DW1), a psychiatrist who holds a position as a professor of psychiatry with the Faculty of Medicine, Universiti Putra Malaysia, as well as a consultant psychiatrist with Ampang Puteri Hospital. DW1 had outlined his professional qualifications and experience. The court has no hesitation in accepting him as an expert in his chosen field.

[60] DW1 identified the medical report (D1) which he wrote for the defendant concerning his clinical findings after examining her on several occasions. The defendant first saw him on 6 January 2012 with a complaint of low mood. What this means is that the defendant was feeling low, depressed and sad. She also complained of physical symptoms such as nausea, poor appetite, poor concentration, and low energy. DW1's diagnosis is based on the Diagnostic and Statistical Manual of the American Psychiatric Association, 4th edn., where the defendant's symptoms would satisfy the criteria in the manual for major depression.

[61] DW1 testified that based on the patient's history, the trigger was most probably the harassment by her boss. The defendant had told him about the harassment by her boss whom she identified as the main stressor. Thoughts about the office would cause her stress and the current court proceedings became a new stressor for her. The defendant was prescribed medication - agomelatine 25mg every night and 0.5mg of alprazolam to be taken when necessary.

[62] DW1 saw the defendant on 6 January 2012, 12 January 2012, 27 January 2012, and 3 February 2012. After seeing her on these for occasions, she showed improvement, but minimally. She was not making better progress because the stressor was still there. As such, DW1 recommended some change of environment to limit her triggers.

[63] DW1 explained that initially, the stressor was the harassment. However subsequently, it became her office which became a cue to images of her harassment. He did not agree that if you remove the harassment from the office, then the victim should show significant improvement. It is his evidence that if the plaintiff were removed from the office, then whether or not his recommendations would be different would depend on the defendant's clinical presentation at that point in time.

[64] DW1 confirmed that the defendant did not inform him that the harassment happened three years ago. However, she did inform him that sometime in August 2009, she was transferred to a different department, namely the Legal Department. He admitted that he knew that the defendant had since left Tabung Haji. DW1 was of the view that even if the plaintiff was removed from the defendant's office environment in the Legal Department, the main

stressor would still be the plaintiff because the harassment occurred. Had there been no harassment, the office environment would not have been a cue for her stressor.

[65] DW1 confirmed that he did not verify anything that the defendant had told him with her colleagues and close friends. He told the court that it would be against professional ethics to do so and he would also lose the trust and confidence of his patients.

[66] The defendant also called Syarifah Safwah Syed Ibrahim (DW3), a manager in the Legal Department of Tabung Haji. She identified the investigation report ("Laporan Siasatan Kes Salah Laku") at pp. 44-63 as only a draft and she produced the final report which was marked as D2. She explained the reason behind D2. On 20 October 2009, the special officer to the COO, on the instructions of the said COO, had asked for a legal opinion from the Legal Department on whether the report on the investigation into the misconduct of the plaintiff and the consequent Serious Administrative Warning issued to him had complied with the processes and provisions of the Kaedah Am Lembaga Tabung Haji 1983. On 4 November 2009, the Legal Department had given its view that the disciplinary procedures that were followed by the Human Resource Division were contrary to the said general orders. Following that, the COO had directed the Legal Department to conduct a fresh inquiry in accordance with the general orders.

[67] For the second inquiry, what they had done was to re-gather all the information based on the evidence which had been recorded from the complainant and the witnesses who were interviewed by the panel during the first inquiry. There were no fresh interviews. The summary of the investigation can be seen in para. 5.0 where the conclusion reached was that the complaint was valid and could be accepted as it was clearly supported by the evidence of witnesses, and in part even by the plaintiff himself. As such, in para. 5.5 it was recommended that disciplinary action under General Order 4(2)(d) and (g) of the Kaedah-kaedah Am Kakitangan Tabung Haji (Kelakuan dan Tatatertib) 1983 Bab D can be taken against a person who commits sexual harassment. The report (D2) was forwarded to the chairman of the Disciplinary Committee.

[68] During cross-examination, DW3 agreed that the plaintiff was not informed about the second inquiry. She agreed that the plaintiff was not given a chance to say anything and neither was he given a copy of the report. She explained that the plaintiff was not given a chance to defend himself because at that juncture, it was still at the early investigation stage and charges had yet to be levelled against the plaintiff.

Agreed Issues To Be Tried

[69] The agreed issues to be tried as agreed between the parties are as follows:

(i) Whether the defendant had defamed the plaintiff through the contents of the defendant's letter of complaint dated 27 July 2009 which was addressed to the Chief Executive Officer;

(ii) Whether the defendant's counter-claim against the plaintiff for sexual harassment is valid in law; and

(iii) In the event that the defendant has a valid cause of action in her counter-claim, is the plaintiff liable for the defendant's emotional and mental pain and suffering.

Evaluation Of The Evidence And Findings

[70] In coming to a decision in this case, the court has carefully considered the evidence adduced by both parties as well as the documentary exhibits tendered in support of their respective cases. The court has also received considerable assistance from the written submissions filed by learned counsel. In this case, the court will deal with both the plaintiff's claim and the defendant's counter-claim in turn.

[71] The plaintiff is essentially suing the defendant for defamation arising out of the defendant's letter of complaint dated 29 July 2009. The letter of complaint was addressed to the CEO of Tabung Haji, Datuk Ismee Ismail, and sets out various instances of the plaintiff's misconduct. The plaintiff submits that these "remarks" of the defendant are defamatory of the plaintiff in their plain and ordinary meaning and were calculated to injure the plaintiff's good reputation. It cannot be disputed that the remarks in the letter of complaint refers to no one other than the plaintiff. It can also not be disputed that the nature of the complaints against the plaintiff is that he is a man:

(i) who utters vulgar words;

(ii) who is fond of making dirty, sex oriented jokes in front of his subordinates without respect for his female subordinates;

(iii) who uses dirty words in e-mails; and

(iv) who had repeatedly offered the defendant to become his second wife.

[72] Learned counsel for the plaintiff submits that the defendant had published the defamation by sending the letter of complaint to the CEO and that the defamation was further published to the panel of inquiry who were tasked with conducting the inquiry. It was further submitted that others had also known about the defamatory complaint, namely the four witnesses who were called to testify as well as Dato' Kamaruddin Ali, the then Chief Operating Officer; Hazlina binti Khalid; and Zubir bin Ahmad Sahaimi, the then Senior General Manager of Human Resources. As such, it is the plaintiff's case that the defamation was published to at least 11 persons.

[73] The plaintiff has submitted that in its plain and obvious meaning, the defamatory remarks contained in the letter of complaint imputes that the plaintiff is a person of low morals, lewd, lacked sensitivity towards his female colleagues, is unethical, unprofessional, and has taken advantage of his subordinates. Because of the plaintiff's "high standing" in Tabung Haji, the defamatory remarks had excited an opinion among the plaintiff's superiors, peers and members of the Tabung Haji organisation that the plaintiff lacked integrity, honour and good morals. He became known as the perpetrator of "the high profile sexual harassment case in Tabung Haji".

[74] The plaintiff alleged that the defamatory remarks had affected his employment prospects such that his contract of employment was not renewed when it expired on 28 February 2010. Further, he had difficulties finding a new job for some six months.

[75] The plaintiff further contends that the defamatory remarks were untrue. The plaintiff relies on the cases of *Abdul Aziz Jelani & Anor v. Peter Chua Swee Lai* [2000] 2 CLJ 402; [2000] 2 MLJ 462, *Voon Lee Shan v. Sarawak Press Sdn Bhd & Anor* [2004] 5

CLJ 430, *Bre Sdn Bhd & Ors v. Tun Datuk Patinggi Hj Abdul Rahman Ya'kub* [2005] 2 CLJ 645; [2005] 3 MLJ 485 as his authorities for the proposition that since the defendant's defence is justification, the defendant has the burden of proving that the defamatory remarks are true on a balance of probabilities. The plaintiff submits that Tabung Haji's investigative panel had found that the complaint lacked evidence and no disciplinary action was taken against the plaintiff, hence the defamatory remarks were on the balance of probabilities "likely to be untrue".

[76] In this case, the court has duly considered that the defendant's defence is two-fold, namely:

(i) The complaints are true and did not defame the plaintiff; and

(ii) The plaintiff did not suffer any loss because the non-renewal of his contract did not arise from the complaint and if he did suffer loss, it was occasioned by his own misconduct and actions.

[77] The court finds from the evidence of PW3, the report P1 as well as the contents of the Serious Administrative Warning that the inquiry carried out by the panel of inquiry or committee of inquiry was in the nature of a preliminary inquiry and fell short of disciplinary proceeding. It would appear that Tabung Haji was, at that time, attempting to gauge the truth of the complaints and seeing its way to determining how best to resolve a potentially embarrassing situation for the institution. At the end of the day, whether rightly or wrongly, Tabung Haji decided on a number of actions which may appear to be somewhat contradictory in its effect. It decided that there were complaints which had indeed occurred and were valid complaints. There were also complaints which could not be confirmed to have occurred. They took the position that the proper approach would be to issue the plaintiff with a Serious Administrative Warning not to repeat such misconduct. To alleviate the defendant's sufferings, they transferred her from the Risk Management Division to the Legal Division, supposedly on a temporary basis.

[78] The court has carefully considered the various allegations of sexual harassment alleged by the defendant in her letter of complaint to see whether these allegations have been proved on a balance of probabilities. In doing so, the court has considered the evidence of the defendant weighed against that of the plaintiff.

The court had scrutinised the evidence of the other witnesses for both parties to see whether they would corroborate one or other of the parties. In this context, the court will categorically state that it is NOT in agreement with the submissions of learned counsel for the plaintiff that this corroboration of the defendant's version of events must come from independent witnesses other than the witnesses who were called by the plaintiff. The court is of the decided view that corroboration of the defendant's evidence of sexual harassment can come from witnesses for the plaintiff and even from the evidence of the plaintiff himself.

The 19 July 2009 Incident

[79] As regards the incident on 19 July 2009 where the plaintiff was alleged to have uttered a vulgar remark to the defendant, namely "FUCK OFF", the court has no hesitation in finding that this incident had indeed occurred. The court finds the defendant's recollection of what had occurred to be clear and lucid. When she had knocked on his door at 8.15am to inform him that she was setting off for Nilai, the plaintiff had uttered the said vulgar words to her. Although thoroughly shocked, she had braved herself to approach his desk to ask him in English: "Dr, did you just say "fuck-off" to me just now?" According to the defendant, the plaintiff did not answer although she asked him the question twice.

[80] This incident was the proverbial needle which broke the camel's back. It was following this incident that the defendant resolved to lodge a formal complaint with Tabung Haji about the plaintiff's sexual harassment of her. The court finds the plaintiff's attempt to say that what he had said was "get off" and not "fuck-off" to be totally unconvincing on two fronts. If indeed he had really said "get off", then, when confronted by the defendant immediately after the incident, it would have been logical and reasonable for him to have immediately explained that no, he did not say "fuck off, what he said was "get off", instead of remaining silent. On the second front, his own admission that he had apologised to the defendant twice over the incident would amount to proof that he had indeed uttered the vulgar words. One would not need to apologise twice for saying "get off."

[81] The court notes that this incident was referred to by DW3 in her report D2. In her investigation, this incident was supported by the evidence of the plaintiff himself where he had claimed that he was angry with his printer and the remark was not meant for the defendant. It was also confirmed by Azmi bin Dato' Mohammad Nor who was also supposed to go for the meeting at Nilai. He had advised the defendant to forget the incident. The plaintiff had also allegedly admitted to Azmi that he had said "fuck-off".

[82] Thus as far as this incident is concerned, the court finds that it has been more than proved. The court accepts the evidence of the defendant that the plaintiff had uttered the vulgar words to her. Whether or not he was angry with a printer at the material time, the court is of the view that the plaintiff has no business uttering such words to the defendant, which words can be viewed as a clear harassment.

[83] Next, the court has considered the defendant's complaint against the plaintiff for making sex oriented dirty jokes in front of his subordinates. The defendant has alleged that there were so many lewd, obscene and vulgar comments, too numerous to count. However, under this head, the court intends to look at three separate incidents, namely:

(i) The "walk the cock incident";

(ii) The "mimpi berjimak" incident; and

(iii) The "coconut terangkat" incident.

The "Walk The Cock Incident"

[84] The defendant's complaint as regards this incident can be seen in para. 48 (i) above where the plaintiff had allegedly used the words "walk the cock" repeatedly and with extreme glee. These words were allegedly said in the presence of Azmi, Tuan Haji Azman, Mohd Fazli and Noraliah Sarin. The court does not see reference to this incident in the evidence of the plaintiff. Neither was Tuan Haji Mohammad Azman (PW4) specifically asked about this incident although he admitted that it was normal for the plaintiff to make dirty jokes and sex oriented comments.

The "Mimpi Berjimak" Incident

[85] In respect of the "Mimpi Berjimak" incident, the plaintiff denied the words that he is alleged to have used although he admitted that the incident did happen. He claimed that he had used words such as "mimpi bersanding". In this regard, it is interesting to note that PW2, the plaintiff's then secretary, had confirmed hearing the words as alleged by the defendant although she had attempted to explain that the plaintiff was only advising her and the defendant. This incident also appears in the report of DW3 where the incident was confirmed by both the plaintiff and PW2.

[86] After weighing the evidence of the defendant as against that of the plaintiff as well as the report of DW3 as regards the results of her interviews with various employees of Tabung Haji, the court is satisfied that on a balance of probabilities, the incident as alleged by the defendant did in fact take place.

The "Coconut Terangkat" Incident

[87] As regards the "coconut terangkat" incident, the plaintiff had merely denied that the incident took place. The court notes that DW3 had stated in her report that this incident was corroborated by Noraliah. In light of the defendant's evidence, which this court believes, the court finds that the defendant's bald denial that the incident took place is but a bare denial. The court thus finds that the defendant has succeeded in proving that on a balance of probabilities, the "coconut terangkat" incident did take place.

[88] Based on the court's findings as regards these three incidents, the court thus finds that the defendant has proven the truth of her complaint against the plaintiff for making sex oriented dirty jokes in front of his subordinates.

Dirty Words In E-mails

[89] In respect of her complaint about the plaintiff using dirty words in e-mails, the court notes that the words complained of are "SOB", "homebreed" and "homebreed, worse than khinzir". These e-mails dated 10 April 2009 have been exhibited and the plaintiff does not deny that he had sent the e-mails. However,

A although the e-mails were addressed to the defendant, the plaintiff disputes that the specific words complained of refer to the defendant.

[90] Looking at the totality of the e-mails and the explanation
B of the plaintiff, the court has no hesitation in accepting that the expletive as well as the unbridled and disparaging remarks in the e-mails actually referred to someone else other than the defendant. Since the plaintiff has clearly admitted that his remarks referred to Tabung Haji's head of internal audit, Encik Azhar Nayan, with
C whom he was angry, the court is prepared to accept that the subject and recipient of his curses and tirade was someone other than the defendant. However the existence of such admitted comments on an e-mail, to whosoever they were addressed, does absolutely no credit to the plaintiff.

D

The Invitations To Become A Second Wife

[91] The other broad area of complaint refers to the various instances where the plaintiff had repeatedly invited or offered the defendant to become his second wife. The defendant had clearly
E identified the different occasions when these offers were made. The plaintiff had merely denied the allegations claiming that he is a happily married man with wife and children and with no intention to take a second wife.

F **[92]** However, the court finds that these incidents did in fact take place as they were corroborated by both PW2 and PW4 although they were of the view that they were not really proposals but were more of a joke or made in jest. The court is of the view that repeated jokes of this nature where the
G defendant was asked to consider marriage to "suami orang" or "laki orang" would have long ceased to be funny or amusing. In light of the clear corroboration that the incidents complained of by the defendant did in fact take place, the court is of the considered view that the plaintiff's words and utterances, whether they were
H intended to be actual proposals or otherwise, amounted to instances of sexual harassment in the work place which should never have happened in the corridors of an institution such as Tabung Haji.

I

[93] In respect of this first issue, the court has also considered that the defendant's letter of complaint were addressed to the CEO of Tabung Haji, who was the plaintiff's immediate superior, and was sent to seek recourse for the wrong which had been done to her. As pointed out by PW3, the complaint that was made by the defendant to the CEO was in order and had followed the proper procedure for a staff who wanted to lodge a complaint against his immediate boss.

[94] In the case of *Ernest Cheong Yong Yin v. Low Kim Yap & Ors* [2006] 6 CLJ 608, the court had struck out the plaintiff's defamation action. The court found that as the defendant had complied with the procedure for making complaints, no malice could be inferred. Her Ladyship Rohana Yusuf JC (as Her Ladyship then was) went on to say as follows at p. 617:

> Allowing a defamation suit of this nature to continue defeats the whole purpose of the complaint process ... and must not be encouraged. If claims of this nature are allowed, the floodgates will be opened to defamation suits whenever disciplinary bodies receive complaints from the public against their members. The public should be free to lodge complaints as a means of recourse against what they perceive to be wrong or unprofessional conduct so long as they do so within the confines of the law. They should be allowed to do so without having to fear the possibility of legal action.

[95] Although the court in the case of *Ernest Chong* (*supra*) was dealing with a complaint lodged with the Board of Valuers, the principles in that case are equally applicable to our present case. An employee with a valid and legitimate complaint against her immediate superior should be able to lodge a complaint to seek redress without fear of a legal action for defamation.

[96] As such, on the first issue, the court finds that the defendant, in sending her letter of complaint dated 27 July 2009 addressed to the CEO, was following the proper procedure for filing a complaint against her immediate superior. As such no malice can be inferred from her actions. In any event, the court finds that her various complaints set out in her letter of complaint, except the complaint about the e-mails, to be true. As such, the court has no hesitation in finding that the plaintiff has failed to prove on a balance of probabilities that the defendant had

defamed him through the contents of the said letter of complaint and the court herewith dismisses the plaintiff's various claims in para. 16 of his statement of claim.

[97] The court will deal next with the defendant's counter-claim for sexual harassment. In dismissing the plaintiff's claim for defamation, the court has already dealt with a number of the alleged incidents of sexual harassment which the court finds to have been proved on a balance of probabilities. These are the incidents which the court has termed "the 19 July 2009 incident", the "walk the cock incident", the "mimpi berjimak" incident, the "coconut terangkat" incident and the invitations to become his second wife. The court does not intend to repeat its findings as regards these incidents.

[98] However, there are certain other incidents of sexual harassment alleged by the defendant in her statement of defence and counter-claim which do not appear in her letter of complaint. These are the "strong ball" incident and the password of the plaintiff's laptop.

The "Strong Ball" Incident

[99] The court notes that plaintiff has denied making the hand signal to signal the word "ball" or even uttering the words "Ingat tak seorang cina masa di bank dulu? Kalau you pergi meeting, you kena tebalkan muka, you kena ada strong ball", he claimed that he was using an example of a senior general manager at Alliance Bank who had remained resilient and persevering despite being attacked by the CEO and the Board of Directors. According to him, he was drawing an analogy between the skin of that person and that of the skin of an elephant added to a rhinoceros. He claimed that he had made a fist ("menggengam tangan saya"), to signify the resilience of the said senior general manager of Alliance Bank. The court finds this explanation to be seriously lacking in credibility. The court sees little or no co-relation between a person with thick skin and the action of making a fist at chest level. The court finds the plaintiff's explanation to be but an attempt to talk his way out of an embarrassing situation, albeit unsuccessfully. The court is inclined to believe the defendant that this incident complained of did take place. The court further finds that such words, even if they referred to someone else other than the

defendant, are words that should have remain unspoken in polite and mixed company. The court is confident that a person in the senior position of the plaintiff should have been better able to motivate his subordinates without the need to resort to such obviously inflammatory words and signals, especially when said in mixed company.

The Password

[100] And now the issue about the password. It is the defendant's evidence that the password of the plaintiff's laptop is "FUCK". Now, a password to a person laptop is a personal matter unless there is a situation where the laptop and password would have to be made known to others for access to the laptop. In this case, the defendant pleads that the plaintiff had spelled out his password to her whilst laughing. The fact of the plaintiff's obscene password is confirmed by PW3's investigations. As seen in her report, D2, both Noraliah and Mohammad Azman Alias had confirmed that the password to the plaintiff's laptop is indeed "FUCK".

[101] In the face of such evidence, the court finds that the plaintiff's protestations that his password is "RISK" since he is known as Dr Risk to be but a meagre attempt to deflect from the truth. On the totality of the evidence, the court finds this complaint to have been proved on a balance of probabilities. Although the use of such an obscene password may not prove to be much in the bigger scheme of some of the plaintiff's other actions and utterances which have been found to have been proved, the court finds that the use of such an indecent password to be but a reflection of the nature, character and morals of the man.

[102] As such, taking into account the totality of all the evidence which has been adduced, it is the court's finding that the defendant has succeeded in making out her counter-claim of sexual harassment against the plaintiff.

[103] Having said that, the court comes now to the issue of whether the plaintiff is liable for the defendant's emotional and mental pain and suffering. The court has heard at length from the defendant about her emotions when confronted with the various

episodes of sexual harassment. These can be seen at para. 56 above. The sexual harassment committed by the plaintiff had the effect of changing her into a person who is depressed, subdued, and always sad.

[104] The defendant's medical condition finds confirmation from the evidence of Dr Azhar bin Md Zain (DW1), the psychiatrist who saw and treated the defendant. The court accepts his medical report (D1) with his clinical findings, which findings have not been seriously challenged or at all. The court thus accepts DW1's findings that the defendant was suffering from major depression caused by the sexual harassment by her boss, the plaintiff, experienced by her at the work place. This comes with physical symptoms such as nausea, poor appetite, poor concentration, and low energy.

[105] The court is satisfied that there is a direct link between her mental, physical and emotional pain and suffering and the sexual harassment committed by the plaintiff. In the circumstances, the court finds that the defendant has succeeded in proving her counter-claim against the plaintiff on a balance of probabilities.

[106] In determining the quantum of general damages, the court has considered the nature and length of the harassment, the fact that the defendant is the plaintiff's immediate subordinate who was in a weaker and more inferior position, forced to tolerate and withstand the harassment. The court is of the view that a strong message must be sent to all those persons in the plaintiff's position who think that just because they are the "boss" they can say whatever they like, to whoever they like, however many times they like without fear of repercussions. No employee should ever be required to remain silent and accept such harassment and degradation for fear of non renewal of contract or loss of employment.

Conclusion

[107] In all the circumstances of the case, the court awards the defendant a sum of RM100,000 as general damages and a sum of RM20,000 as aggravated and exemplary damages, interests on the above sums at 4% per annum from the date of judgment to the date of full settlement and costs to be taxed unless otherwise agreed. The court considers the above award to be a suitable

recompense which is not meant to enrich the defendant but one that would afford her some measure of vindication. It is hoped that with the conclusion of this case, the defendant would put this bitter and painful episode behind her and move out from the morass of the past to a new and brighter tomorrow.